UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. ORACLE AMERICA, INC., Defendant.	OALJ Case No. 2017-OFC-00006 OFCCP No. R00192699 **DEFENDANT ORACLE AMERICA INC.'S OPPOSITION TO OFCCP'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

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I. PRELIMINARY STATEMENT

This litigation has been pending for more than two years. During that time, the parties have engaged in extensive motion practice, Oracle has produced an incredible amount of discovery (more than 96,000 documents and over 85 million discrete fields of data), and the parties spent over a year trying to resolve the matter through mediation. Indeed, even before litigation commenced, OFCCP spent 18 months investigating Oracle pursuant to the underlying compliance audit that ultimately led to this litigation, culminating in the March 11, 2016 Notice of Violation ("NOV") on which OFCCP's claims are based. Despite the passage of more than four years, only *now* does OFCCP seek to assert claims based on allegations of discriminatory job channeling and the use of prior pay. Those allegations are not in the NOV, they are not in OFCCP's Original Complaint, they are not in OFCCP's First Amended Complaint ("FAC"), and they are not in OFCCP's interrogatory responses, including those OFCCP served pursuant to a 134-page order *compelling* OFCPP to disclose all facts and evidence supporting its allegations. These claims are entirely new.

While private litigants enjoy great latitude in their ability to amend their complaint, the same is not true for OFCCP. To the contrary, pursuant to Executive Order 11246 and its implementing regulations, OFCCP is obligated to engage in reasonable efforts to resolve any purported findings of discrimination identified in an NOV through conciliation prior to bringing an enforcement action. This requirement is deliberate and backed by policy: it gives federal contractors notice of the claims against them and encourages claim resolution before costly and lengthy litigation. OFCCP cannot litigate without first satisfying these mandatory prerequisites.

Here, despite having prosecuted this matter for more than four years, OFCCP now wants to change course. Why? There are two plausible reasons, and both dictate denying OFCCP's pending motion. First, OFCCP added these new claims because it realizes its existing claims against Oracle are doomed to fail, and it therefore wants some alternative theories – ones for which it currently has no facts to support but hopes to develop through additional discovery. Second, following a year-long stay and a failed attempt to resolve this matter, OFCCP seeks to try this case in the press as a means of exerting pressure on Oracle – perhaps in coordination with private plaintiffs' counsel

prosecuting a civil action against Oracle that those plaintiffs admit piggy-backs on OFCCP's claims, and with whom OFCCP entered into a secret oral agreement to share information and work together, which was only reduced to writing when Oracle raised concern about the impropriety of a federal government agency coordinating with private plaintiffs' counsel to bolster their respective claims.[1] Indeed, in OFCCP's haste to publicly file its proposed Second Amended Complaint ("SAC") – accompanied by a motion whose only purpose appears to be to disparage Oracle – OFCCP violated the stipulated protective order that governs the confidential compensation data on which OFCCP's new claims purport to rely. This easily could have been avoided if OFCCP had agreed to send Oracle a copy of the SAC prior to filing it, as Oracle requested. OFCCP refused, apparently focused more on making headlines than following standard practice in "civil" litigation.

But there is another problem with OFCCP's proposed SAC. The gratuitous claims of gross pay disparities between employees who allegedly perform similar work (an allegation which, as described below, is demonstrably false because it is based on the inaccurate premise that employees at Oracle who share the same job title or job code perform similar work), as well as the claims of alleged statistical disparities in hiring in Oracle's college recruiting program, are based on purported "analyses" of data from outside the time period at issue in the underlying compliance audit on which this litigation is based. While OFCCP is permitted to seek damages up to the present if it can prove a "continuing violation," it is axiomatic that OFCCP *first* must prove a violation that took place during the audit period itself. OFCCP is not permitted to do what it seeks to do here: use data acquired in discovery to replead and even change its earlier claims. Indeed, OFCCP recently *admitted* in a separate matter pending against a different contractor that it must first prove a violation during the audit period, which case law also confirms.

Because OFCCP's new claims are futile, were brought in bad faith, and are unduly prejudicial to Oracle, its pending motion should be denied. With a hearing scheduled to take place

[1] OFCCP's "common interest agreement" with the plaintiffs' counsel in *Jewett v. Oracle Am., Inc.*, No. 17-CIV-02669 (Cal. Super. Ct. San Mateo County, June 16, 2017) is attached as Exhibit A to the Declaration of Erin Connell ("Connell Decl."). Several recent press articles have reported on both OFCCP's new claims and new allegations made in *Jewett*, which were filed just four days before OFCCP filed its SAC.

in December 2019, the litigation instead should continue based on the OFCCP's FAC, which contains the allegations on which OFCCP's conciliation efforts – reasonable or not – were based.

II. FACTUAL, ADMINISTRATIVE, AND PROCEDURAL BACKGROUND

A. Administrative Framework

The regulations enacting Executive Order 11246 require that before OFCCP brings a lawsuit against a contractor, OFCCP first must complete a number of mandatory administrative prerequisites: OFCCP must investigate, find a violation, and engage in reasonable efforts to reach informal resolution with the contractor about that violation. More specifically, after conducting a compliance review, if OFCCP concludes that "deficiencies are found to exist," OFCCP "shall" then make "reasonable efforts" to address those deficiencies and "secure compliance through conciliation and persuasion." 41 C.F.R. § 60-1.20(b). Only after OFCCP has undergone such reasonable efforts to "resolve[]" the violations uncovered during the investigation through "informal means" (*i.e.*, conciliation) can OFCCP obtain approval for, and bring, a lawsuit against a federal contractor in this Court. *Id.* §§ 60-1.24(c)(2)–(3); *see id.* § 60-1.33 (describing the conciliation process for circumstances where "a compliance review" by OFCCP "indicates a material violation of the equal opportunity clause").

Consistent with that framework, OFCCP can initiate administrative enforcement proceedings when OFCCP finds "violations [that] have not been corrected in accordance with the conciliation procedures . . . or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate." 41 C.F.R. § 60-1.26(b)(1); *accord id.* § 60-1.24(c)(3) ("Where any . . . compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Deputy Assistant Secretary shall proceed in accordance with § 60-1.26 [i.e., enforcement proceedings].").

B. Factual and Procedural Background

The Notice of Violation. On September 24, 2014, OFCCP initiated a compliance review of Oracle's headquarters, which ultimately resulted in the March 11, 2016 NOV. SAC ¶ 6 & Ex. A. The audit lasted 18 months. OFCCP came on site twice for approximately eight days to conduct

interviews with at least 35 managers and human resources employees. Oracle also produced an enormous volume of data and documents in response to more than 30 supplemental requests by OFCCP, several containing multiple sub-parts. The NOV issued by OFCCP following the audit contains the allegations that frame the present litigation. With regard to allegations of compensation discrimination, based on a regression analysis (Attachment A to the NOV) of one year of compensation data for employees employed at Oracle's Headquarters as of January 1, 2014, the NOV asserts discrimination against women in Information Technology and Support roles, and against women, Black, and Asian employees in Product Development roles. NOV at 3–5. Importantly, the NOV expressly bases its claims on OFCCP's belief that Oracle was "paying them less than comparable [White and male employees] *in similar roles*." *Id.* (emphasis added). In other words, the claim of compensation discrimination was for people OFCCP believed were performing similar jobs. There was no allegation of channeling certain groups of people into lower paying jobs; nor was there any allegation of a policy or practice of basing starting pay on employees' pay at their prior place of employment.

With regard to hiring and recruiting, the NOV claims that Oracle discriminated against "non-Asian" applicants (*i.e.*, Black, Hispanic, and White applicants) and "favor[ed] [] Asian applicants, particularly Asian Indians . . . for Professional Technical 1, Individual Contributor ('PT1') roles." NOV at 1–3. OFCCP's recruiting and hiring claim is specifically limited in time to "the review period from January 1, 2013 through June 30, 2014." *Id.* at 1.

The Show Cause Notice & Conciliation. On June 8, 2016, OFCCP issued a Show Cause Notice ("SCN"), incorporating the NOV as the "list of violations" upon which the Agency could initiate enforcement proceedings. Connell Decl. ¶ 3, Ex. B at 3. Setting aside the reasonableness of OFCCP's purported conciliation efforts, OFCCP admits – as it must – the conciliation efforts that did take place were limited to the violations identified in the NOV. FAC ¶ 17.

The First Amended Complaint & Initial Litigation Before Judge Larsen. On January 17, 2017, OFCCP filed its Complaint and, eight days later, the FAC correcting typos. Like the NOV, the FAC contained no allegations of supposed channeling of certain groups to lower paying jobs or

lower starting salaries based on previous salaries from other employers. Rather, the FAC mirrored the NOV's compensation allegations based on a comparison of certain groups supposedly performing "similar roles." FAC ¶¶ 7, 8, 9. Likewise, the recruiting and hiring claim was based on alleged preferential hiring treatment for Asians over Non-Asians. *Id.* ¶ 10.

The parties thereafter engaged in significant motion practice on the pleadings and the scope of the litigation, and exchanged cross-motions to compel discovery. Despite OFCCP's strained efforts to paint Oracle as the party who has refused to produce necessary data and documents in this litigation, it is OFCCP who, after months of stonewalling and displaying a total lack of transparency, was ordered by Judge Larsen – in a 134-page order compelling discovery and rejecting OFCCP's efforts to hide behind purported government privileges – to produce whatever facts and evidence OFCCP possessed in support of its claims. OFCCP's responses to that discovery order *confirm* that the huge dollar figures OFCCP touts in the press result *solely* from misleading statistics that do not compare the pay of individuals who perform similar work, as required by the anti-discrimination statutes the Agency enforces. Moreover, the OFCCP's interrogatory responses – both the versions filed before and after Judge Larsen's order compelling OFCCP to show its cards – say *nothing* regarding job channeling or assignments, nor about basing employees' starting salaries on the salaries paid by their previous employers. *See* Connell Decl. ¶¶ 4–5 & Exs. C, D.

OFCCP's Discovery To-Date Confirms Its Allegations of Compensation Discrimination Rest Solely on a Flawed Statistical Analysis That Wrongly Assumes "Job Title" Equates "Similarly Situated." OFCCP's misleading allegations about pay (including those in the SAC) do not demonstrate unlawful pay discrimination because they incorrectly lump together employees who may share similar labels (such as job title or job code) but have very different job duties and responsibilities. These differences are because of the nature of Oracle's business. Unlike many other tech companies, Oracle's products and services vary widely in the technologies they power and the functions they support. For example, Oracle's products include everything from cloud computing solutions to middleware to industry-focused software to hardware to network solutions and more. Oracle's application, platform, and infrastructure technologies enable enterprise

information technology environments worldwide. More broadly, Oracle products assist customers with an array of objectives, including enterprise resource planning, customer experience and customer relationship management, procurement and supply chain management, human capital and talent management, business analytics, financial management, and governance, risk, and compliance.[2]

Oracle's wide array of products and services translates to a similarly diverse set of skills, duties, and responsibilities among Oracle employees, depending upon the product or service (or the component of a product or service) on which an employee works. Stated another way, just as the technologies themselves differ, so do the skills, duties, and responsibilities needed to develop, enhance, modify, support, or service those products and services. This can be true regardless of job title or job code. By contrast, OFCCP's "analyses" focus solely on labels, not on actual job duties and responsibilities. Accordingly, OFCCP compares apples to oranges. And, as OFCCP is well aware, the law does not prohibit paying people differently for different work.[3]

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[2] *See, e.g.*, Oracle Products and Services, https://www.oracle.com/products/ (last visited Feb. 5, 2019); Oracle Products A-Z, https://www.oracle.com/products/oracle-a-z.html (last visited Feb. 5, 2019); Oracle Acquired Products A-Z, https://www.oracle.com/products/acquired-a-z.html (last visited Feb. 5, 2019).

[3] Ample case law, as well as detailed guidance from OFCCP's "sister agency" the EEOC, confirm that reliance on labels such as job title or job code does not suffice to prove similarity of job content for purposes of proving pay discrimination; instead an assessment of the actual job content is required. *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 255–58 (2nd Cir. 2014) (dismissing complaint relying on similarity of job codes because job codes "say nothing of actual job duties and are thus peripheral to an EPA claim"); *Warren v. Solo Cup Co.*, 516 F.3d 627, 630–31 (7th Cir. 2008) (rejecting Title VII pay claim where plaintiff and her comparator were not "similarly situated" because they had "very different educational backgrounds, experiences, and qualifications"); *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 772 (7th Cir. 2007) (park managers not similarly situated to each other "because the parks are so different from one another"); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 263 (4th Cir. 2005) (affirming exclusion of statistical analysis that lumped together overbroad job groupings, finding that "there [was] simply too much disparity in the groups" and no "factor that would control for the actual job title or the job duties"); *Coser v. Moore*, 739 F.2d 746, 753 (2d Cir. 1984) (affirming rejection of Title VII pay discrimination claim because plaintiffs' statistical analysis did not account for differences in prior work experience and actual job duties, which were "crucial variables that must be taken into account in comparing relative salaries"); *Cooper v. S. Co.*, 260 F. Supp. 2d 1305, 1314–15, 1317 (N.D. Ga. 2003) (striking expert report where the statistical analysis "fail[ed] to compare similarly situated individuals" because it did not "account for differences in the type or level of the employees' applied skills, both of which are highly related to compensation" and did not "compar[e] employees with equivalent work experience in specific job categories or job progressions"), *aff'd*, 390 F.3d 695 (11th Cir. 2004); *Gibbons v. Auburn Univ. at Montgomery*, 108 F. Supp. 2d 1311, 1318 (M.D. Ala. 2000) (professors who "were hired much later than [plaintiff], achieved a higher rank, or lacked the [same] combination of teaching and administrative responsibilities [as plaintiff]," were not similarly situated to plaintiff); U.S. Equal Employment Opportunity Commission, Compliance Manual 10-III, EEOC

OFCCP Participates in a Press Campaign to Disparage Oracle, and Attempts to Bolster Its Meritless Compensation Discrimination Claim with New Unfounded Allegations of Channeling and Reliance on Prior Pay. Oracle has spent the last two years demonstrating to OFCCP that the above explanation is true. In response, now – for the first time – OFCCP attempts to amend its complaint to bring unfounded alternative theories that Oracle "channels" female, Black and Asian employees into lower paying jobs, and discriminatorily relies on prior pay in setting starting pay. SAC ¶¶ 12, 18; *accord id.* ¶¶ 22, 25, 29. As the Court is aware, on January 22, 2019, following a year-long stay of the case for mediation, OFCCP for the first time, during a call with the Court, informed Oracle that OFCCP intended to bring a motion for leave to amend its complaint. Connell Decl. ¶¶ 12, 14. Oracle requested an opportunity to review the proposed amended pleading before OFCCP filed it, but OFCCP refused. *Id.*

Instead, OFCCP publicly filed its motion for leave, which attaches the proposed SAC. Connell Decl. ¶ 15. Within a few short hours, OFCCP's new allegations were widely reported in the press. *Id.* ¶ 16. Both OFCCP's motion and SAC reveal confidential compensation information produced by Oracle under a protective order that prohibited such disclosure. Had OFCCP provided Oracle a copy of its proposed SAC prior to filing it, as Oracle requested and is typically done in civil litigation, Oracle would have raised this issue with OFCCP (and ultimately the Court, given the parties' disagreement over the confidentiality issue).

III. ARGUMENT

The parties agree Federal Rule of Civil Procedure 15 governs OFFCP's request for leave to amend. Under Rule 15, a request for leave to amend must be denied if futile, pursued in bad faith, or causes undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Court should deny OFCCP's request for leave for all three reasons.

Directives Transmittal No. 915.003, 2006 WL 4672890, at § A.1.b (Dec. 6, 2000) (determining whether employees are similarly situated requires an "investigation" into whether the jobs "involve similar tasks, require similar skill, effort, and responsibility, and are similarly complex or difficult").

A. OFCCP's Proposed New Claims Are Futile Because OFCCP Did Not Conciliate Them.

A proposed amendment is futile when the amendment cannot survive a motion to dismiss. *Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997); *accord Riley v. Taylor*, 62 F.3d 86, 92 (3d Cir. 1995). Such futility includes dismissal for failure to comply with required pre-suit obligations. *Jones v. N.Y. State Div. of Military & Naval Affairs*, 166 F.3d 45, 54 (2d Cir. 1999) (proposed claim was futile because it "would be subject to immediate dismissal" for failure to "exhaust administrative remedies," which may "obviate[] any need for judicial interference").

OFCCP claims that in its SAC its "compensation discrimination claim remains *essentially unchanged*" and that the SAC "narrows and clarifies" and offers "refinements" to its earlier claims. Mot. at 1–2, 6 (emphasis added). Not so. The proposed SAC includes the following new claims, none of which OFCCP included in the NOV or conciliated: (1) a claim that Oracle channels or assigns female, Asian, and Black employees to lower paying positions; (2) a claim that Oracle discriminated against female, Asian, and Black employees by relying on their prior salaries; and (3) claims arising outside the audit period. An agency's failure to follow legally established notice-and-conciliation procedures subjects its claims to immediate dismissal. *See, e.g.*, *U.S. Equal Opportunity Comm'n v. Dillard's Inc.*, No. 08-CV-1780-IEG PCL, 2011 WL 2784516, at *8 (S.D. Cal. July 14, 2011) (dismissing claims on which EEOC failed to provide notice and conciliate). Allowing amendment to include these claims would therefore be a futile waste of the parties' and the Court's resources. The parties would be forced to engage in pointless motion practice to dismiss the improper claims, further delaying the progress of this case.

1. As an Administrative Prerequisite to Filing Suit, OFCCP Must Issue an NOV Describing the Claims at Issue and Conciliate Them.

Executive Order 11246 and its implementing regulations set forth a comprehensive scheme of administrative procedures the OFCCP must exhaust before it can pursue an enforcement action. These requirements embody critical and widely acknowledged policy objectives. Among other things, the administrative process serves to limit the adjudication of non-meritorious lawsuits,

promote judicial economy, and ensure that lawsuits do not "peremptorily substitute litigation for conciliation." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008).

OFCCP's first obligation following an investigation is to issue an NOV, alerting the contractor to the violations OFCCP claims to have uncovered. This first step is essential for putting contractors on notice of the allegations and providing an opportunity to resolve them.

After serving an NOV on the contractor, both the Executive Order and its implementing regulations mandate that OFCCP make reasonable efforts to conciliate the alleged violations contained in the NOV. "Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance . . . by methods of *conference, conciliation, mediation and persuasion before proceedings shall be instituted.*" Exec. Order No. 11246, 30 Fed. Reg. 12319, § 209(b) (emphasis added); *accord* 41 C.F.R. § 60-1.20(b) ("Where deficiencies are found to exist, reasonable efforts shall be made *to secure compliance through conciliation and persuasion.*" (emphasis added)). Only after it attempts to resolve the violations through conciliation may OFCCP bring a lawsuit against a federal contractor. 41 C.F.R. § 60-1.24(c)(2)–(3); *accord id.* § 60-1.26(b)(1) (OFCCP may only bring a claim based on "violations [that] have not been corrected in accordance with the conciliation procedures . . . or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate."); Government Contractors, Affirmative Action Requirements, Exec. Order No. 11246, 62 Fed. Reg. 44184 (Aug. 19, 1997) (OFCCP is "required to make reasonable efforts to secure compliance through conciliation" and observing that it would be incorrect to read § 60-1.26(b)(1) as "eliminat[ing] the duty to conciliate").

OFCCP likewise recognizes in its own Federal Contract Compliance Manual that it must conciliate before filing a lawsuit.[4] OFCCP, Federal Contract Compliance Manual, § 8G01, at 265

[4] As OFCCP has said in formal rulemaking, its manual "contains the policy guidance interpreting the Executive Order and regulations, as well as agency instructions for implementing the regulatory provisions." Government Contractors, Affirmative Action Requirements, Exec. Order No. 11246, 62 Fed. Reg. 44180; *cf. Church of Scientology v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) ("an administrative agency is required to adhere to its own internal operating procedures" including those printed in an internal manual).

("After a [Compliance Officer] issues a [Notice of Violation], he or she will attempt to reach an acceptable resolution of the violation findings through voluntary conciliation efforts with the contractor."); *see also id.* § 8F01, at 264 (recognizing that notices of violation "initiate the conciliation and resolution process").

Where an agency has a pre-suit obligation to conciliate, courts will not allow it to expand the suit without meeting such obligations. Operating under analogous legal requirements, courts have not allowed the EEOC to expand the scope of litigation to violations beyond those that it conciliated pre-suit.[5] *See, e.g.*, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 672 (8th Cir. 2012) ("[T]he EEOC's power of suit and administrative process are not unrelated activities, but sequential steps in a unified scheme for securing compliance with Title VII." (quotation marks omitted)). As here, the EEOC in *CRST* had an obligation to attempt to remedy allegedly objectionable employment practices "through the informal, nonjudicial means of conference, conciliation, and persuasion." *Id.* Given the "strong emphasis on administrative, rather than judicial, resolution of disputes," *id.* at 674 (citation omitted), the Eighth Circuit held the EEOC must limit its enforcement to claims that it uncovered in its investigation because only those alleged violations are "subject to a conciliation proceeding," *id.* Further, "[w]here the scope of its pre-litigation efforts are limited – in terms of geography, number of claimants, or nature of claims – the EEOC may not use *discovery in the resulting lawsuit* as a *fishing expedition* to *uncover more violations*." *Id.* at 675 (emphasis added).

The Eighth Circuit is not alone in holding government agencies to their mandatory pre-suit obligations. The Southern District of California came to a similar conclusion in *Dillard's*. 2011 WL 2784516 (cited approvingly by *CRST*, 679 F.3d at 674, 676). There, in relevant part, the court granted defendant's motion to preclude the EEOC from pursuing disability discrimination claims by alleged victims other than the two whom the EEOC identified during pre-suit proceedings. *Id.*

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[5] Given the similarity between the EEOC and OFCCP requirements, it would not make sense to treat them differently. In a case on which OFCCP repeatedly has relied, the Secretary of Labor found instructive how courts have treated EEOC proceedings. *See OFCCP v. Honeywell, Inc.*, 77-OFC-3, 1993 WL 1506966, Secretary's Decision and Order, at *7 (Dep't of Labor June 2, 1993) (looking to "comparable situations under Title VII" to interpret OFCCP's authority).

at *5–8. Echoing many of the statements repeated in *CRST*, the court found that an agency cannot "seek relief" beyond what is "identified during the investigation." *Id.* at *6 (quoting *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996)). Combining the agency's pre-suit obligations and the goal of dispute resolution, the court concluded: "The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is *necessary* to provide the defendant-employer *adequate notice*, of the charges against it and a *genuine opportunity* to resolve *all charges through conciliation*." *Id.* (emphasis added).[6]

Pursuant to the clear dictates of the Executive Order, regulations, and case law, OFCCP may not bring enforcement claims based on allegations not included in the NOV and not conciliated. Claims that do not comply with those pre-suit obligations are subject to immediate dismissal and are therefore futile. *Jones*, 166 F.3d at 54. Indeed, to find otherwise would allow OFCCP *carte blanche* to issue an unfounded NOV on one topic, use that NOV to file suit and go on a discovery fishing expedition, and then amend its complaint later, bypassing its clear obligation to conciliate.

2. OFCCP Has Not Conciliated Its Job Channeling or Assigning Claim.

Despite OFCCP's repeated insistence that its job channeling and assignments claim is not new, the difference between this claim and its existing compensation discrimination claim is obvious. OFCCP's original pay discrimination claim is an allegation that people who are similarly situated, *i.e.*, alike in all material respects and do the same job, are paid differently based on race or gender. *See* NOV at 3–5; FAC ¶¶ 7–9. In contrast, OFCCP's new claim for job channeling is an allegation that Oracle steers employees into different, lower-paying jobs based on their race or

[6] *See also EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 810–16 (S.D.N.Y. 2013) (rejecting EEOC's attempt to "substitute its own investigation with the fruits of discovery to identify which members of the class, none of whom were discussed specifically during conciliation, might have legitimate individual claims"); *EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1262–67 (D. Colo. 2007) (holding that "the EEOC . . . failed to carry its burden of showing that its investigation put Defendants on notice of the national scope of the potential claims against Defendants"); *EEOC v. Am. Samoa Gov't*, Civ. No. 11-00525 JMS/RLP, 2012 WL 4758115, at *16–35 (D. Hawaii Oct. 5, 2012) (rejecting EEOC's government-wide claims because its investigation was limited to discrimination in only one department); *EEOC v. Orig. Honeybaked Ham Co. of Ga., Inc.*, 918 F. Supp. 2d 1171, 1177–80 (D. Colo. 2013) (rejecting EEOC's attempt to extend allegations of harassment to additional managers because the investigation, reasonable cause letter, and conciliation efforts pointed to the unlawful conduct of only a single manager).

gender. The difference in the two claims is evident from the proposed SAC, which makes clear OFCCP is asserting a new "alternative theory" to its existing claim: *i.e.*, that certain groups of people are paid less for "the same or comparable job" *or* that such persons are hired into different "lower-paid jobs." *See* SAC ¶¶ 12, 18, 22, 25, 29.

Indeed, the regulations implementing Executive Order 11246 clearly delineate between the two claims. The regulations first prohibit pay discrimination, stating that "Contractors may not pay different compensation to similarly situated employees on the basis of sex." 41 C.F.R. § 60-20.4(a). The regulations further dictate that proving pay discrimination requires a "case-specific" analysis and is determined by factors such as "tasks performed, skills, efforts, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors." *Id.* § 60-20.4(a). *Separately*, the regulations prohibit job channeling, stating that "Contractors may not grant or deny higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, or other opportunities on the basis of sex." *Id.* § 60-20.4(b).[7]

Even the OFCCP's own compensation directives (both Directive 307, which was in place during the underlying compliance audit here, and Directive 2018-05, which is in place now) recognize the differences between pay discrimination and discriminatory job channeling. *See* U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, DIR 307, Procedures for Reviewing Contractor Compensation Systems and Practices (2013) (distinguishing a claim for "Similar job, different pay" from a claim for "Similar Qualifications, different job," and recognizing that "[s]tatistical testing applied to practices that impact pay such as job assignment may require a *different analytic grouping* than tests for within job pay differences." (emphasis added)); U.S. Dep't of Labor, Office of Federal Contract Compliance Programs, DIR 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (2018), at 4 (recognizing that "Monetary compensation" and "Assignment outcomes such as placement into particular jobs" are different "employment practices that can lead to compensation disparities").

[7] Although § 60-20.4 is specific to discrimination based on sex, the same principles apply to claims of discrimination based on race.

In short, pay discrimination and job channeling claims are different. OFCCP cannot rely on its pay discrimination claim in the NOV to justify bringing a new job channeling claim without issuing a new NOV and offering an opportunity to conciliate.[8]

3. OFCCP Has Not Conciliated Its New Claim Based on Prior Salary.

Also under the guise of presenting "refinements" to its claims, OFCCP inserts a second entirely new alternative theory of discrimination: OFCCP alleges that Oracle underpays female, Asian, and Black employees because of its "reliance on prior salaries in setting starting salaries." SAC at 1.[9] Nowhere in the NOV or FAC does OFCCP allege anything about employees' prior salaries at previous employers. And because those claims were not in the NOV, OFCCP could not have conciliated on this issue before bringing this suit. Accordingly, for the same reasons discussed above, amendment as to prior salary is futile. This claim must be dismissed because OFCCP did not meet its obligation to conciliate before launching this allegation in litigation.

4. OFCCP's Amended Claims Are Futile to the Extent They Are Based on Allegations Arising Outside the Audit Period.

The NOV covers only the time frame of January 1, 2013, through June 30, 2014, with respect to hiring discrimination, and the time frame January 1, 2013, through December 31, 2013, with respect to pay discrimination (together, the "Audit Period"). NOV at 1–5. Now, however, OFCCP seeks to amend its complaint to base its underlying allegations on events that took place *after* the Audit Period. Because claims based on events that took place outside of the Audit Period *necessarily* were not included in the NOV, OFCCP did not – and could not have – conciliated them. Accordingly, OFCCP has not met its pre-suit obligations with respect to those claims, rendering them subject to immediate dismissal and therefore futile. *Jones*, 166 F.3d at 54.

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[8] OFCCP's proposed job channeling claim also would fail. OFCCP's sole basis for this claim is a purported higher concentration of men and White employees in higher paying jobs. *See* SAC ¶¶ 18–21. This does not equate to or demonstrate discriminatory job channeling, particularly because Oracle posts its jobs and candidates are free to apply to whichever jobs they choose.

[9] Oracle has expressly prohibited inquiries into prior pay since October 2017, prior to when California and other states enacted laws prohibiting inquiries into prior pay. Before that, Oracle did not have a policy regarding the use of prior pay in setting starting pay; instead, it was up to individual hiring managers.

Specifically, OFCCP's SAC asserts that Oracle discriminated against university and college applicants based on race.[10] In support of this claim, however, OFCCP presents only data from 2015 and 2016, *i.e.*, outside the Audit Period, or data that is aggregated from 2013 to 2016. This is not permissible. Because violations must be "*subject to a conciliation* proceeding," the agency "must discover such . . . wrongdoing *during the course of its investigation*," not after the investigation has concluded and the complaint has been filed. *CRST*, 679 F.3d at 674 (emphasis in original) (quotation marks omitted). OFCCP cannot use data acquired after the Audit Period to plead that a violation occurred during the Audit Period; rather, the Agency's complaint must be limited to the "unlawful conduct that it has uncovered during the course of its investigation." *Id.*; *accord Dillard's*, 2011 WL 2784516, at *6.

OFCCP is likely to argue it can seek damages to the present under a "continuing violation" theory (*i.e.,* violations during the audit period that continued thereafter). But any such argument does not change OFCCP's obligation to first prove that a violation occurred during the Audit Period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 US 101, 118 (2002) (supporting the proposition that claims of continuing conduct may be based on acts occurring outside of the limitations period, so long as at least one act contributing to the claim occurred within the period); *W. Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000) ("For a continuing violation to be established, a plaintiff must show 'a series of related acts, one or more of which falls within the limitations period . . . .'"). Only then may OFCCP seek damages going forward. OFCCP cannot do what it attempts here: it cannot use discovery obtained during the litigation from a time period outside the Audit Period to bolster its claims of discrimination during the Audit Period. Indeed, OFCCP has admitted that where there is no violation during the audit period, it cannot seek relief for conduct *after* the audit period because "there is no continuing violation." *See*

[10] In its proposed SAC, OFCCP appears to abandon its earlier claim regarding Oracle's recruiting and hiring of experienced employees. Of course, if OFCCP wishes to limit its claim to cover only college hires, it is free to do so at any time, and does not need to amend its complaint to do so.

Connell Decl. ¶ 6, Ex. E (*OFCCP v. Analogic*, 2017-OFC-00001, ALJ's Hearing on Analogic's Motions, 65:5–20 (Dep't of Labor June 27, 2017)).

Finally, there is an important policy reason for not allowing OFCCP to work backwards as it is attempting to do now. Allowing OFCCP to use data acquired in discovery to replead and even change its earlier claims is exactly what the Eighth Circuit prohibited in *CRST*.[11] 679 F.3d at 675. Without holding the agency to its pre-suit requirements for all claims, the agency is incentivized to use discovery as "a fishing expedition to uncover more violations."[12] *Id.*

B. OFCCP's Motion for Leave Should Be Denied as Brought in Bad Faith.

Not only are OFCCP's new claims futile, but OFCCP's motion should be denied because it was brought in bad faith. OFCCP's proposed SAC and, even more so, its motion for leave, contain unnecessary vitriol plainly calculated to receive widespread media attention – which is exactly what happened. Moreover, both OFCCP's motion and proposed SAC reveal confidential compensation information produced under the terms of a stipulated protective order (the "Protective Order"), which OFCCP impermissibly, and without Oracle's authorization, disclosed publicly. This easily could have been avoided if OFCCP had followed standard practice and professional courtesy by providing Oracle a copy of the proposed SAC before filing. Indeed, had this occurred, Oracle would have informed OFCCP that certain information was confidential and could not be publicly filed, and because the parties disagree over whether the SAC violates the Protective Order, subsequently could have asked the Court to intervene to resolve any disputes. OFCCP's failure to do so bespeaks the sort of bad faith that warrants denying its request to amend.

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[11] Once again, Oracle underscores the difference between litigation initiated by OFCCP and litigation brought by a private litigant who is not constrained by OFCCP's pre-suit obligations. Although a private litigant may have grounds to amend a pleading based on information learned in discovery, OFCCP cannot use discovery as a tool to navigate around its pre-suit obligations.

[12] For the same reason, OFCCP's request to amend its allegations regarding Oracle's purported failure to produce relevant data and records must be rejected. OFCCP's proposed amendments include the assertion that Oracle failed to collect and maintain information related to its college recruiting program "through at least 2016." SAC ¶ 45. Once again, just as OFCCP cannot use discovery obtained in litigation to replead and change its allegations, it cannot replead its underlying claim of misconduct *during* the Audit Period to be based on events that allegedly took place *after* the Audit Period.

"Bad faith on the part of the moving party also supports denying the motion to amend." *Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986 (9th Cir. 1999). Bad faith amendments are those that are "made in order to secure some ulterior tactical advantage." *GSS Props., Inc. v. Kendale Shopping Ctr., Inc.*, 119 F.R.D. 379, 381 (M.D.N.C. 1988). "Generally, when a plaintiff withholds his true position from his opponent, especially when done for some ulterior purpose, the Court may view the action as having a bad faith motive unless satisfactory explanation clearly shows otherwise." *Id.* Likewise, an amendment is sought in bad faith when it is motivated by a desire to "embarrass and harass" the opposing party. *Anderson v. Davis Polk & Wardwell LLP*, 850 F. Supp. 2d 392, 415–16 (S.D.N.Y. 2012).

On May 26, 2017, after receiving the parties' submission of a Proposed Stipulated Protective Order,[13] Judge Larsen entered a Protective Order in this case. The Protective Order governs, among other things, the production, disclosure, and dissemination of "Protected Material(s)." Connell Decl. ¶ 8, Ex. G (cited hereinafter as "Protective Order"). "Protected Material(s)" are those materials "designated as 'CONFIDENTIAL,'" because they contain "confidential information" "that, based on the Designating Party's good faith belief, may be subject to Freedom of Information Act . . . Exemptions 4 or 6 [regarding trade secrets, confidential commercial or financial information, and personal private information]." *Id.* §§ 2.2, 2.11. Pursuant to and under the protection of the Protective Order, Oracle produced employee compensation data to OFCCP with the designation "CONFIDENTIAL." Connell Decl. ¶ 10. Although there was available a mechanism for OFCCP to challenge Oracle's confidentiality designations, Protective Order § 6, at

[13] Although the parties disagreed on one provision of the Proposed Stipulated Protective Order, the Protective Order ultimately entered by the Court simply excised the debated provision (not at issue here), meaning the remainder of the Protective Order was stipulated. *See* Connell Decl. ¶ 7–8 & Exs. F, G. Moreover, and lest there by any doubt, counsel for OFCCP expressly confirmed that "the parties have agreed to every provision of the protective order, except for one," and further agreed "we will agree that documents and information Oracle produces after the proposed protective order was submitted to Judge Larson on May 19, 2017 will be governed by the most restrictive version of the protective order, pending a ruling by Judge Larson. Once Judge Larson issues a Protective Order, the documents and information Oracle produces after May 19, 2017 will be governed by that Order." *Id.* ¶ 9, Ex. H. Having agreed to the Protective Order provisions at issue and received discovery under that Protective Order, OFCCP was not authorized to ignore or assume away the Protective Order.

no point did OFCCP do so, Connell Decl. ¶ 11. Under the terms of the Protective Order, OFCCP was therefore obligated to treat this designated information as Protected Material and not to disclose it publicly or to unauthorized persons without Oracle's express authorization. Protective Order § 7.

As OFFCP acknowledges, the actual compensation figures and employee counts contained in the proposed SAC are derived directly from data that Oracle produced under the "CONFIDENTIAL" designation. By including them in a public filing, OFCCP violated the Protective Order, the scope of which covers "not only Protected Material . . . but also . . . all copies, excerpts, *summaries*, *compilations* of, or written materials containing Protected Material."[14] Protective Order § 3 (emphasis added).

OFCCP further breached § 12.3 of the Protective Order, which provides that a Receiving Party wishing to file briefs, exhibits, or other materials containing "CONFIDENTIAL" information must give notice before or at the time of filing to the party that produced the material and the Court. Protective Order § 12.3. In a pre-hearing conference call between the parties the week before the hearing, OFCCP provided no indication that it intended to propose a new complaint. Connell Decl. ¶ 13. Even at the hearing, where OFCCP for the first time said that it intended to seek leave to amend its complaint, OFCCP did not share the proposed complaint with Oracle, which would have given the parties the opportunity to meet and confer on the issue (and, if necessary, seek guidance from the Court as the Protective Order contemplates). *Id.* ¶ 14.

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[14] To be clear, Oracle does not contend that public disclosure of OFCCP's analyses of Oracle's compensation data violates the Protective Order – so long as the analysis does not reveal the underlying compensation data itself, which is confidential. For example, in the NOV, Complaint, and FAC, OFCCP described its analysis, including the employee populations analyzed, the factors used in its regression model, and the results (*e.g.*, the percentage differences in compensation or hiring rates and resulting standard deviations). Unlike the SAC, the NOV, Complaint, and FAC did *not*, however, reveal the actual compensation figures and employee counts along with those results, which allow reverse engineering to determine the average compensation Oracle pays employees in each of the job functions at issue. OFCCP has argued in letter exchanges with Oracle that this information is not entitled to confidential treatment. Connell Decl. ¶ 17. Even if OFCCP is correct, however, the Protective Order outlines a detailed process for bringing challenges to confidential designations – it does not permit what OFCCP did here, which is to unilaterally decide which information designated confidential by Oracle is *truly* worthy of protection, without first notifying Oracle and giving Oracle the opportunity to seek Court intervention if the parties cannot agree. *See* Protective Order § 6. Given the parties' disagreement over this issue, further Court involvement likely will be needed regarding the Protective Order's scope as well as how to resolve disputes regarding confidential data.

Consistent with OFCCP's repeated efforts to try this case in the press, within hours of filing, many news sources published stories reproducing the numbers or linking directly to the proposed SAC. Connell Decl. ¶ 17. Publicly filing a proposed SAC containing futile claims replete with "CONFIDENTIAL" material (and without notice to the opposing party) constitutes an improper use of a Rule 15 amendment and warrants denial here.[15]

Finally, OFCCP cannot rely on the reassignment of this case to escape the terms of the Protective Order. Not only was the Protective Order stipulated to by the parties, Connell Decl. ¶ 7, Ex. G, but it explicitly extends beyond the life of this litigation and states:

> Even after final disposition of this litigation, the confidentiality obligations imposed by this Order remain in effect unless a Designating Party agrees otherwise, an order otherwise directs, or a subsequent change in the law or regulation provides otherwise. If Counsel become aware of a change in law or regulation that affects the terms of this provision during the pendency of this litigation, such Counsel will advise Counsel for the other Party.

Protective Order § 4. In other words, any argument by OFCCP that the Protective Order is no longer binding because of issues related to Judge Larsen's appointment is no excuse. First and foremost, the Protective Order governs unless and until the designating party (*i.e.*, Oracle) agrees or there is some change in the law. Oracle did not agree that the protections of the Protective Order vanished, particularly because Oracle produced the confidential information under the express expectation that the protections contained in the Protective Order would apply and be followed. Connell Decl. ¶ 10. Nor does any change in the law help OFFCP. Even if OFCCP believes the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), called into question the continuing enforceability of the Protective Order (which, once again, was stipulated between the parties as to the provisions at issue here), OFCCP was not permitted to unilaterally act on that belief.

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[15] Even if OFCCP is correct and its new claims are not really "new," this only strengthens the conclusion that there was no need or legitimate basis for OFCCP to have filed its motion and proposed SAC at all – other than to create a flurry of negative media attention in an effort to disparage and create pressure on Oracle.

C. OFCCP's Motion for Leave to Amend Should Be Denied Because It Unduly Prejudices Oracle.

Under Rule 15, "[t]he principal test for prejudice . . . is whether the opposing party was denied a fair opportunity to defend and to offer additional evidence on that different theory." *Evans Prod. Co. v. W. Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984). "Whether an amendment is prejudicial will often be determined by the nature of the amendment and its timing." *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006). Prejudice also occurs when proposed amendments "involve new theories of recovery and impose additional discovery requirements." *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008).

Here, OFCCP's claims of job channeling and discrimination based on prior pay are entirely new. It is now 2019. OFCCP's underlying allegations involve activities that occurred in 2013 and the first half of 2014. Not only will the addition of new claims at this late stage further complicate the already incredibly burdensome amount of discovery involved in this proceeding, but, given the passage of time, Oracle is unfairly disadvantaged in terms of its defense.

OFCCP's new allegations necessarily implicate hiring decisions for the individuals purportedly covered by OFCCP's compensation discrimination claim (*i.e.,* employees with the job function of Product Development, Information Technology, or Support at HQCA from January 1, 2013 to the present). Yet the Oracle managers who made those decisions – and otherwise would be likely witnesses critical to Oracle's defense – undoubtedly have experienced faded memories, and several have now likely left Oracle. This directly prejudices Oracle's ability to mount its defense. *See, e.g.*, *iMedicor, Inc v. Access Pharms. Inc.*, 290 F.R.D. 50, 53–54 (S.D.N.Y 2013) (finding prejudice where "none of the twelve employees who are alleged to have performed services for defendant is currently employed with plaintiff, and their general whereabouts is unknown. Thus, as time has gone by, the ability of defendant timely to obtain discovery from those former employees has diminished if not been made impossible"); *see also Tenneco Resins, Inc. v. Reeves Bros.*, 752 F.2d 630, 634–35 (Fed. Cir. 1985) (finding prejudice where amendment would require new discovery because "possible witnesses maybe have dispersed" and because "memories fade"). The passage of time is particularly prejudicial to Oracle given the individualized nature of Oracle's

hiring and compensation decisions. Although Oracle has expressly prohibited inquiries into prior pay since October 2017, prior to that time Oracle did not have a policy regarding the use of prior pay in setting starting pay (including any policy of *relying* on prior pay). Instead, whether and the extent to which to rely on prior pay was up to individual hiring managers, whose memories have faded and who may have taken on new teams, switched roles, or left Oracle all together.

IV. CONCLUSION

For the reasons set forth above, Oracle respectfully requests that (1) the Court deny OFCCP's motion for leave to file a Second Amended Complaint, and (2) if needed, schedule a hearing with the Parties to resolve their disputes over the Protective Order.

Respectfully submitted,

February 5, 2019

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PROOF OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is cflores@orrick.com.

On February 5, 2019, I served the interested parties in this action with the following document(s):

DEFENDANT ORACLE AMERICA INC.'S OPPOSITION TO OFCCP'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT; and

DECLARATION OF ERIN CONNELL IN SUPPORT OF DEFENDANT ORACLE AMERICA, INC.'S OPPOSITION TO OFCCP'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

Marc A. Pilotin (pilotin.marc.a@dol.gov)
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 5, 2019, at San Francisco, California.

CHRISTINE J. FLORES